

A black and white portrait of Sir Keith Joseph, a man with dark, wavy hair, wearing a dark suit jacket, a white shirt, and a patterned tie. He is looking directly at the camera with a neutral expression. The portrait is set against a light background and is framed by a dark blue border.

FREEDOM UNDER THE LAW

The Rt Hon Sir Keith Joseph Bt MP

Conservative Political Centre

35p

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UNDER
THE LAW**

CONSERVATIVE POLITICAL CENTRE

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Any doubts I may have had about the need for a bill of rights to protect the citizen's liberties and livelihood against overweening executive power resting on a minority of the poll have been removed during the past few months. Michael Foot, a Brutus in opposition but caesarian in office, has flouted the considered view of editors from a very broad political spectrum and lent Government blessing to arrangements which may seriously undermine press freedoms. Tax policy is clearly to be used to destroy a substantial proportion of independent businesses, from the one-man to the largest, and to denude independent political or intellectual activity of funds. Political loyalty and acceptability to the Trade Union leadership will be made a major and overriding criterion for managerial and supervisory posts if the legislative steamroller turns Mr Benn's proposals into legislation.*

Were I to write on the economic situation, I should be able to take its seriousness for granted and concentrate on causes and proposed remedies. I cannot do so in the case of the rule of law. I must show that what are still widely regarded as blemishes are in fact symptoms of rot, that the rule of law is being eroded, and that the dangers unless we fight to reverse the trends of the past half century are great. Only then shall I gain an audience for my proposals.

My views may be categorised as alarmist, reactionary, or both. But so, then, were my warnings on the state of the economy last summer. Would that I had been proven wrong by that most telling of arguments, the train of events. In the case of the economy, facts speak for themselves. The erosion of the rule of law is not so

*See page 7.

immediately evident, for two good reasons. First, many of the forms have remained while the content is being eroded, rather like a house being eaten away by termites.

Secondly, there are strong pressures from two distinct directions to avoid recognising the dangers. One set of pressures comes from those who regard the rule of law as dispensable, or even an obstacle to their social engineering. I shall say much more of this later.

The second set of pressures, human nature being what it is, comes from inside our own camp. In part, it is the very natural reluctance to envisage these grim prospects, as Coleridge wrote:

'Like one, that on a lonesome road
Doth walk in fear and dread
And having once turned round walks on
And turns no more his head:
Because he knows, a frightful fiend
Doth close behind him tread'.

And, since my generation of politicians has presided over this erosion, we are understandably predisposed to ignore it if we possibly can. The process has been highlighted by the disgraceful episodes of Clay Cross and the 'Shrewsbury' agitation. Over Clay Cross, the Government abandoned not only the principles of the rule of law but its own self respect. As for 'Shrewsbury', the leadership of the trade union movement with the vocal and tacit support of most of the Cabinet and Parliamentary Party—though with honourable exceptions—feels free to campaign on behalf of the left-wing bully boys and for the implicit right of trade union gangs to use violence against fellow workers and employers with impunity. In light of this, all the more credit to those few voices raised unequivocally inside the Labour movement on behalf of legality and in support of Mr Jenkins's stand. Mr Prentice, who spoke quite frankly, has since been joined by the Member for Bradford West, a Queen's Counsel

who has not spared his words.* (His criticism of the choice of charges is fair comment, whether one agrees with it or not.)

But that the campaign can be waged at all shows how far respect for law has been eroded. These are no chance aberrations but the manifestation of a sustained process. It is this erosion which we must trace and act against. And who are most guilty? Is it the many socialists whose views on law and liberty are substantially different from ours, where they are not fundamentally opposed? Or is it those of us who have tried to shut our eyes to the dangers, stilling our qualms with self-deception and cosy assurances that good sense will prevail and the pendulum go on swinging for ever?

AN EXOTIC PLANT

Before I define and analyse the concept of the rule of law, I must point out that historically speaking it is an exotic plant, the exception rather than the rule. England has enjoyed it for three centuries. It was not won without sacrifice; why should we believe that it will sustain itself without any effort on our part? The good things of life are rarely free. A generation back, it seemed as though the whole world were following in our footsteps; all the Victorians took this for granted: Karl Marx was as confident of it as Herbert Spencer, Gladstone as Robert Owen. The preservation of the rule of law was paramount for generation after generation of jurists and political thinkers. By now, we see that the rule of law is a minority taste among the nations of the world. We must earn our continued good fortune. Can our generation consider giving away this birth-right for the very thin stew of 'social justice'?

The rule of law is not as simple as it seems. It entails predictable laws which are in general accord with prevailing concepts of natural justice. The law must be applied impartially as

**The Times*. Letters to the Editor. 24th January, 1975.

between individuals, and as between the subject and the executive. This necessitates an independent judiciary competent to judge all acts.

The rule of law is focused on the individual. His – or her – person, property, rights, freedom, good name, are its prime concern. This was not because previous generations of jurists and political philosophers were unaware of the importance of community or society. But they saw society as composed of individuals and families, and judged society by its service to the individual.

Experience confirms that they were right. Whenever the rights of the individual are overridden for the sake of some ostensible higher aim, some collective good which transcends individual rights, we move towards despotism, in which the rights of all individuals are sacrificed to the interests and political fashions of the ruling hierarchy. The collective good, the general will, social justice – subjectively well-intentioned though each may be – all come to serve as a screen for the arbitrary use of power. The rule of law begins with the individual, because individuals are real, whereas society is an abstraction. So philosophies which reject individualism as evil cannot but undermine the rule of law, whatever their intentions or protestations.

FREEDOM IN DANGER

You will have noted that I rank the right of property and private economic activity very high. This will seem shocking to the present guardians of our conventional wisdom, though not to the majority of the people. Without property and individual economic rights, all other rights are insecure. Once the state – which means politicians and bureaucrats – can take away your property – including your home and your income – restrict your right to earn your living, make you dependent on them for the kind of health service you receive, where and how your children will be educated, how and when you may travel abroad, your

access to other freedoms will be in danger too. Freedom of speech means access to communications media; freedom of the press is possible only where people have the resources to start up publications and solicit support and subscriptions as best they can.

Where the party-state controls jobs in management and the professions, where the unions and shop-stewards control jobs at a manual level, it takes a bold man or a foolhardy one to speak his mind. Look at any socialist state. When governments have reduced private industry to near bankruptcy, so that without some sort of government aid they cannot continue, which industrialist will talk openly?

So much for the importance of property and professional independence – and this holds as much for the small shop, the small plumber or decorator, as it does for doctors and teachers. I stress this to remind you that the right to own property and engage in business is not only important economically, but even more important politically. Public opinion has long since turned against the 'company town', the situation in which a few companies or rich men had a monopoly of employment and economic power in a town or area. How much worse it would be if the whole country were one large company-town, one party-state run by a one-state party, owning everything: industry, the nationalised medical service, the national education service, TV and radio and the press; and most else. Read Labour's programme for the 'state take-over of business' (their expression)! They promise to ensure that public enterprise is ... run by people who believe in it ... ensure key influence to socialists who believe in the job that the National Enterprise Board is trying to do, and avoids total reliance on an existing managerial structure'.*

I stress this since currently fashionable cant

**The National Enterprise Board* a Labour Party Green Paper 1973. This is now embodied in the Wilson Government's industrial legislation.

denigrates the rule of law – as it grew up in preceding centuries – because of its concentration on individual property rights. Perhaps those men who put England ahead of the world, made Britain admired and emulated by the world then, were not so far from the truth after all. To avoid misunderstanding, let me insist, I am not suggesting that what was good enough for the Victorians will remain good for ever. But there is all the difference between building on sure foundations, and destroying these foundations. What may seem to the impatient as obstacles to progress can equally be barriers against regression.

I began this essay with the statement that the erosion of the rule of law had been going on for some time. One current, which already evoked concern in the inter-war period, was the growth in uncontrolled executive power. Lord Chief Justice Hewart spelled this out with great cogency in 1929 in *The New Despotism**, which everyone should read. Since then, the process has gone much further.

THE BULLDOZER

Think, for example, of the compulsory purchase orders (CPO) and slum clearance orders. Hundreds of thousands of homes have been appropriated during a few decades, often at a fraction of their value, for the most arbitrary reasons, with little chance for owners or residents to oppose. Successive housing acts make it possible to 'represent' as unfit almost any dwelling you choose, whatever the people who live in it believe. Housing departments must build in order to justify their existence. In most towns, they can only build by demolishing. So demolish they will. Some local authorities are convinced that they can emulate developers and make fortunes by large city-centre developments, and vastly expand their rate-base. So, they compulsorily acquire houses and shops, all of which have been servicing

*Ernest Benn.

the public and providing their owners with a living earned usefully and in dignity. The CPO rides in front of the borough bulldozer.

People affected resent it, but what can they do? The minister, who is eager to inflate his 'slum clearance' statistics and urban renewal claims, will not be deterred by their pleas. I know. I have been a keen Minister of Housing, dedicated to the conventional wisdom of the time.

What over-riding social and economic goal has been achieved by the CPOs and slum clearance? It is now commonplace, though there were always those who said it, that it would have been far more economic to rehabilitate most—not all—of the hundreds of thousands of homes destroyed than to bulldoze them; it is now realised that bulldozing did great social harm, destroying communities as well as property, and that many council estates were bound to become foci of social pathology. This, too, was known a long time ago, but it has not stopped the bulldozers churning.

The great city-centre renewal schemes have driven out the small shop, the men who repaired your shoes, your watch, your household machinery. The great new centres stand in some cases half empty, a burden on the rates. Who gained? Certainly not the poor, whom it is easier to bulldoze than to rehabilitate. I recommend to you two studies of Sunderland by Norman Dennis: *People and Planning* and *Public Participation and Planners Blight*.^{*} He shows, with a wealth of research, that the lower income groups are generally by the nature of things the most helpless victims of the activities which are ostensibly performed in their name. Referring to the Millfield Clearance Scheme, he writes:

. . . 'The status granted information and its accuracy by the staff of an organization is not a function of their personal code or even their training so much as (i) the directness of the

^{*}Faber & Faber 1970, 1972.

link between the quality of the decisions and the benefit or detriment to the decision-takers themselves; and (ii) the permeability of their information structure to inspection. In the field of slum clearance, lifting and so forth, the planners' mistakes harm others but do not harm them. The people they harm are, furthermore, the crustacea of the social and political world. Boiled alive, they utter no sound. Accurate and relevant facts, therefore, exercise no compelling force on the planners' decisions and the protection from scrutiny they enjoy and ensure means that they habitually get away, to use a homely phrase, with murder' ...*

I have seen too many Millfields, too many CPOs which rode roughshod over feelings and property for the most tenuous benefits at best.

Had these decisions been subject to courts of law, might things not have turned out differently? Courts are bound by rules of procedure and evidence. Evidence must be given on oath. Officials must state their personal belief, not take refuge behind council policy. The ordinary people would be heard. The right of man to his home would be weighed against grand self-assured claims of the new paternalists following their short-lived policies and panaceas.

Officials and councillors would be cross-examined on oath, ministers of the crown, too, if need be. Equality before the law, whatever its shortcomings, is far more real than equality before officials and ministers.

TOWN PLANNING

Town planning is another aspect of economic life which impinges on the majority of our citizens and where decisive powers over property and people are wielded administratively with very limited scope for appeal to the courts of law. The workings and results of this system are being

**Op. cit.*

increasingly criticised even by those who were formerly its most devout admirers. For example, Professor J. James, now of Sheffield University and formerly the Government's Chief Planner, has recently admitted that the system is 'complex, slow, frustrating and expensive'. I remember when I was Minister that some were saying this many years ago. But worse than that, the system is inevitably arbitrary. The subject is too complex and far-reaching to deal with in this forum; it merits separate and fuller treatment which I hope to devote to it on a subsequent occasion. Suffice to say that if the system is to be re-examined in all its aspects, has not the time come to consider whether its exclusion from normal legal processes is justified now that the social and practical benefits promised from this have not materialised after all? When you compare decisions in comparable authorities, they bear no relation to one another. It is impossible to predict decisions of planners or of ministers on appeal.

Other and newer invasions of our residual rights are on the way.

I have touched on several rights. The list is far from complete. In a sense, debasement of the currency practised by successive governments is an invasion of rights, taxation without representation. But what can one say about the new wealth and inheritance taxes? Unjust, but fully within the law. But which law?

I argued earlier in this essay that the right to earn one's living independently and to enjoy and transmit property, that is, a means of livelihood, is an essential right, which underlies the exercise of other freedoms. This right can be destroyed by confiscatory taxation, as we see, leaving people no choice but to be employees, and increasingly state-employees, during their working life and pensioners afterwards, dependent increasingly on the state for their housing, the education of their children, their health, and all other needs.

We can protect these rights only by placing a constitutional limit on taxation, that is taxation on

incomes and property, during life and at death. Whether we should have a fixed proportional upper limit, as they do in some countries, or some other system to be worked out; the need is urgent, and the system would have to be placed under the control of the highest court of the land.

PARLIAMENTARY SOVEREIGNTY

This consideration brings us to a further dimension of the rule of law; that laws as well as their application should be predictable and in accordance with ideas of natural justice. But, you will say, this comes up against the principle of the sovereignty of Parliament. So it does. If Parliamentary government is to survive, it must exercise self-denying ordinances as it has always done in the past. That is the essence of democracy.

The very bulk of legislation distinguishes it in kind and not just in degree from earlier days. MPs themselves cannot keep up with it, and their watchdog function – over legislation and executive acts alike – is therefore eroded. There is no way of preserving Parliament's effective sovereignty other than by limiting the flood of legislation. Are we to believe that all our laws are so unsatisfactory that they need changing almost year by year – not to mention Mr Healey's quarterly budgets which necessitate a quarterly Finance Bill? In that case, why should we believe that newer bills introduced in the same spirit as their predecessors will be any better? More will mean worse. Cut down legislation and save the law.

The unbridled supremacy of Parliament is quite recent, historically speaking. Parliamentarians of the past believed that Parliament, though *primus inter pares* among the powers, should respect the independence of other institutions. They saw the 'liberties of Englishmen', as actually enjoyed, as the great barrier to despotism. Parliament was respected precisely because it rested on a great base of independent and separate institutions. By

turning on them and subjecting them, it is eroding its own political base.

Respect for the law has traditionally been deep-rooted in Britain. It grew with the years, reflecting a belief in the rightness of the law, which had grown up slowly, and adapted slowly but surely to change. Things are quite different now, when highly political, controversial and far-reaching legislation abrogating traditional rights, is churned out by Parliament unceasingly. Governments who received a minority of the poll, an even smaller minority of all citizens, use the majesty of the law to dress up their prejudices and panic expedients. But this has inevitably undermined respect for the law in general. If some people or groups – be they trade unionists or ratepayers – can enjoy widespread sympathy when they defy politically unpopular laws, the next step is for people to defy any laws they find inconvenient.

Which brings me back to natural justice and the need to embody it in law. Until recently, people of all classes regarded the law as basically just. The Marxist minority would call it 'class law', more out of habit than from immediate conviction, but the public was not with them. Today, the law is becoming a party-political football. If we are to save the law from Parliament, and Parliament from itself, we need a new safeguard.

A BILL OF RIGHTS

That is why opinion is moving towards consideration of whether we need a Bill of Rights. This would have several functions. First, it would outline the division of powers, as far as possible restoring to the courts their function of the protection of the individual and corporate bodies.

Secondly, the Bill of Rights would provide a self-imposed restraint on Parliament. It would subject Parliament to the rule of law. Perhaps it might divide Parliamentary functions into categories of importance and portent, and lay down different scales of majority needed to justify them.

Major changes would surely need Parliamentary majorities reflecting a majority of the nation. The Socialists can hardly cavil at this when they have demanded a referendum on the issue of joining the EEC.

A constitutional court would be needed to vet legislation, delegated or not, for compliance with the Bill of Rights.

I am not alone in arguing this. Lord Scarman, in last year's Hamlyn Lectures, concludes from his appraisal of the conditions of laws and the citizen today, that a new settlement is needed to replace that of 1689 which gave Parliament the unfettered sovereignty which it did not press to excess for another two and a half centuries. He approaches the question from a different direction: much of what he writes could be called 'progressive'. But he reaches the same conclusion: To maintain a just society — he argues — we must preserve the rule of law. But the sovereign power of Parliament as wielded in our days, 'more often than not exercised at the will of an executive sustained by an impregnable majority, has brought about the modern imbalance in the legal system. The common law is no longer the strong independent ally but the servant of Parliament. This perhaps did not matter quite so much as long as the constitution of Parliament itself contained effective restraints upon the will of a bare majority in one House . . . the less internal control Parliament is prepared to accept, the greater the need for a constitutional settlement protecting entrenched provisions in the field of fundamental human rights, and the universality of the rule of law . . . '*.

He therefore proposes 'a new constitutional settlement replacing that of 1689 to be worked out by Parliament, the judges, the Law Commission and the government . . .'. Its basis 'should be entrenched provisions, (including a Bill of

*English Law — New Dimensions. *Sweet and Maxwell*, 1975.

Rights) protecting it from attack by a bare majority in Parliament; a supreme court of the United Kingdom charged with the duty of protecting the Constitution'.

Lord Scarman's ideas have been in the air for some time. They would be assured of some support from the legal profession, and from the educated public. Can we not convince Parliament that the settlement is essential not only for protecting the citizen's rights but also Parliament's own, that the Parliamentary revolution will devour the mother of Parliaments herself by creating an overweening executive, through processes well known to us, which ends by draining Parliament itself of much of its powers? In other words, unless Parliament is prepared to limit its own powers of its own free will, it will nurture its own nemesis.

Several European countries have constitutional safeguards against the executive. In France, they have developed a system of administrative law, under which the executive is not allowed to be judge of its own cause. Lord Chief Justice Hewart contrasted this system favourably with the adoption of pseudo-judicial functions by the executive itself in this country, which he called 'administrative lawlessness'.*

But I am emboldened by the writings of Lord Justice Scarman to think that the system of administrative law could be spliced into our common law.

Since writing this, I have been apprised of similar proposals mooted by Lord Hailsham as far back as 1969, and recorded in a CPC publication.†

Opponents may argue that a Bill of Rights would slow things down: less slum clearance, less great renewal schemes, less redistribution. So much the

**Op. cit.*

†*New Charter*. Some proposals for constitutional reform by The Rt. Hon. Quintin Hogg QC MP, now again Lord Hailsham. (CPC April 1969).

better. I have voiced the growing view that the borough bulldozer, the borough housing department and the borough as developer were better curbed. But what about redistribution, taxing or virtually expropriating Peter to subsidise Paul? I must argue that this too has been counter-productive, whichever of the two parties won the auction.

It is not I alone who believes this: facts burst in on us all. I recommend to you an interesting pamphlet issued recently by the Labour Economic Finance and Taxation Association, called *Redistribution: A Review of Progress*.*

When I say 'interesting', it does not mean simply that I agree with the pamphlet or the pamphlet agrees with me. For one thing, it threw new light for me on several questions. Secondly, I can recommend it for style, method and tone, models for the political debate which should seek meeting of mind and persuasion, rather than appeals to authority or dogma.

The author argues, and indeed demonstrates, that the whole vast redistribution system actually changes very little in the distribution of resources . . . 'so small a result is achieved by so great an expenditure of effort'. Secondly, he shows that much of the government expenditure leads to misallocation of resources, burdens on all classes, and difficulties for well-run firms, leading to the danger of a recession. He shows that by rushing ahead and trying to do too much too soon, government actions are counter-productive.

So not all social-democrats would see some constitutional limitations on government power through a Bill of Rights as irksome, at least not irksome enough to justify a wholesale battle against the idea. I must say that many valid criticisms of the expanded power of the bureaucracy over the people have come from social

*Written by John Mills. *Labour Economic Finance and Taxation Association*, London, 1974.

democrats at a time when we Conservatives were revelling in the new powers.

CONCLUSION

Yet many of the evils I have been discussing stem from the effect of socialist theory on the climate of opinion. The judiciary has been constantly denigrated as reactionary, an obstacle to streamlining the working of society. Under Marxist influence, often at one or two removes, British justice was all too easily written off as 'class justice', 'capitalist justice'. Yet even a serious Marxist should surely say that *bourgeois* justice is better than no justice at all, and that the test of social progress should surely be that the virtues and benefits of the existing stage of society are retained and enhanced in the newer form, not thrown away in exchange for institutions which seem suspiciously like the reincarnation of earlier, pre-democratic forms of society.

In the light of experience, I argue that the kind of society we have inherited from the Victorians has the potential for great progress, advances in well being, and expansion of rights for the less fortunate without adversely affecting existing rights of their fellows! We have a long way to go in impressing this view on academic and other opinion-forming circles, where the debate has been one-sided for a generation. Both the facts and changing public mood are there to reinforce our argument. But of course we need the conviction and courage of our convictions from the outset, if we are to achieve this.

We have been too ready to accept fashionable views in order to be in the fashion. We Conservatives must surely rest more confidently on traditional wisdom, while picking our way through circumstances, events, ideas and intellectual fashions. We are not better than our forebears just because we come after them and stand on their shoulders.

In human affairs, no gains are secure for all

time, nothing is every hopelessly lost. It depends on people, and I am confident that people will respond if our great historic party shows them the way.

The Rt. Hon. Sir Keith Joseph, Bt. is Member of Parliament for Leeds North-East, and Opposition Spokesman with over-all responsibility for Policy and Research.

In 1959 he entered the Government as Parliamentary Secretary to the Ministry of Housing and Local Government. He was Minister of State, Board of Trade, from 1961 until July 1962, when he was appointed Minister of Housing and Local Government and Minister for Welsh Affairs, with a seat in the Cabinet, and was made a Privy Councillor.

He has been Chief Opposition Spokesman on the Social Services and Wales 1964-65, on Labour and Social Services 1965-66, on Labour April-December 1966, on Trade 1966-November 1969. Spokesman on Technology and Trade 1969-70. Following the Conservative election victory in June 1970, he was appointed Secretary of State for Social Services.

Sir Keith held this post until February 1974. He was responsible for a major reform of the Social Services. In March 1974 he was appointed a member of the Shadow Cabinet and in the reshuffle of June 1974 until February 1975 he was Opposition Spokesman on Home Affairs.

Sir Keith Joseph is the founder and Chairman of the Management Committee of the Centre for Policy Studies Ltd., formed in June 1974 to secure fuller understanding of the methods available to improve the standard of living, the quality of life and the freedom of choice of the British people, with particular attention to social market policies.

